No. 4838.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

John P. Carter, formerly United States Collector of Internal Revenue, Sixth District of California,

Plaintiff in Error,

vs.

Edith Ames English, Executrix of the Estate of Annie B. Ames, Deceased; and Edith Ames English, as an Individual,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

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I.

Statement.

This was an action brought in the District Court of the United States, in and for the Southern District of California, Southern Division, by the defendants in error, to recover federal estate taxes paid under protest. The complaint in this action was filed on the 1st day of June, 1925. Thereafter and when the cause was at issue, a stipulation of facts was entered into and upon such stipulation of facts the cause was presented for determination to the Honorable Edward J. Henning, judge of the District Court, as aforesaid, a jury having been waived by the parties, and judgment was given in favor of the defendants in error and against the plaintiff in error in the sum of $7969.97. The material facts may be summarized as follows:

By the terms of the will of Charles L. Ames, the father of defendant in error, who died testate February 24, 1915, certain real property, located in the state of California, was devised to the defendant in error herein and her mother, Annie B. Ames, and the survivor of them, in joint tenancy. Annie B. Ames died May 15, 1918. Federal estate taxes, on one half of the value of the aforesaid joint estate were assessed against the gross estate of Annie B. Ames, pursuant to section 202 (c) of the Revenue Act of September 8, 1916, which taxes were paid under protest by the executrix, and which were sought to be recovered in this cause.

II.

Specifications of Error.

The errors, assigned by the appellant, are, first, that the court erred in not entering judgment for the plaintiff in error upon the agreed statement of facts; and secondly that the conclusions of law, as made by the court, are not supported by the findings of fact and hence that the judgment, as entered, is contrary to law.

The Government's position is not that the Revenue Act of September 8, 1916, is retroactive, and covers and attempts to tax a transfer fully executed and completed before its enactment, but rather, to use the language of the pertinent sections of the act, has taxed "the value *at the time* of his (decedent's) death *of all property* * * * (c) to the extent of the interest therein *held jointly* * * * *by the decedent and any other person*" (italics ours).

It must be admitted that in this case the decedent, defendant in error's mother, at the time of her death, held jointly with another person, the defendant in error, property as a joint tenant. The words "property held jointly by the decedent and any other person" can mean nothing less than "property owned jointly by the decedent and any other person," or "property of which the decedent and another person are jointly seized or possessed," that is, "the joint property of decedent and any other person" at the time of the decedent's death. The language is so clear as to prohibit other construction.

It cannot be seriously suggested that a statute relating to "all property * * * *held* * * * by the decedent" at the time of his death refers only to property acquired after the passage of the act, and such is the necessary result of the defendant in error's contention. If this contention be correct, then manifestly the same suggestion applies to sub-section (a) of the act, which relates to all property which the decedent held separately at the time of his death. If the status of ownership at the time of death must be modified by the time of acquisition, then no property can be included in a decedent's gross estate if it was acquired prior to the passage of the act, regardless of the state of ownership at the time of death. The act would only apply to property acquired by the decedent after the passage of the act. Since, however, the statute is founded not upon the acquisition of rights by the decedent, but the cessation of his rights at death, such a construction defeats the real purpose and plan of the statute.

The most strict construction of the words "held * * * jointly by the decedent and any other person" strengthens rather than weakens the government's position. To justify the construction which was contended for by the defendant in error, it is necessary to interpolate a special proviso excepting from the general language of the statute all joint tenancies created prior to the passage of the act. The statute in effect says "all property held jointly by the decedent." The construction necessarily placed on it by the court below makes it read "all property held jointly by the decedent except property held jointly prior to the passage of the act." The act contains no such exception, and affords no reason or basis for assuming that such an exception should be read into it.

III.

It Is Reasonable to Include Property Held Jointly by the Decedent in Decedent's Gross Estate.

(a) *The nature of the Federal Estate Tax.*

The federal estate tax imposed by the Revenue Act of 1916, as amended, is not a direct tax upon property, but belongs to that class of indirect taxes known generally as "death duties." Such taxes rest "in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power or the transmission from the dead to the living on which such taxes are more immediately raised."

Knowlton v. Moore, 178 U. S. 41, 56.

The transmission upon which such taxes are raised may, of course, be a transmission of title by reason of death. On the other hand, the transmission may be merely of the physical property, that is, of the possession and enjoyment.

Scholey v. Ren, 23 Wall. 331;
Wright v. Blakeslee, 101 U. S. 174.

Whenever, therefore, there is a change either of title or possession or enjoyment resulting from death, there is an occasion upon which a "death duty" may be imposed. Such "death duties" may be imposed either with respect to the cessation of the decedent's interest, or with respect of the receipt by the beneficiary.

The federal estate tax belongs to that class of "death duties" which are imposed by reason of the cessation of the decedent's interest.

New York Trust Company v. Eisner, 256 U. S. 345;
Greiner v. Lewellyn, 258 U. S. 384;
United States v. Woodward, *et al.,* 256 U. S. 632;
Y. M. C. A. v. Davis, 264 U. S. 47;
Edwards v. Slocum, 264 U. S. 61.

The federal estate tax then is an excise upon the beginning of the transmission upon the cessation of decedent's interest in property, which, during his life time, he owned. This tax, being an excise tax, must be measured, and that measure lies within the sound discretion of Congress.

It cannot be arbitrary, but if it bear a reasonable relation to the subject matter of the tax, it will not be subject to review by the courts. For this purpose, Congress has looked not to the dates or manner of acquisition but to the date and manner of cessation. As construed by the Supreme Court, the statute does not include property in which the decedent's interest ceased prior to the passage of the act, but it seems to be a logical, if not a necessary, thing to include the value of estates held in joint tenancy in which both tenants have, during their life time, a joint interest, which interest as to each tenant ceases upon his death and after the passage of the act.

If Congress has failed to include them, it has missed so much of its general purpose. When it fixed as the measure of the tax "the value of the net estate," which value is defined as the result of deducting from the gross estate certain amounts specified by the statute, it clearly intended that the rate of tax should depend not upon the transmission by death, viz. upon the occasion of the tax, but upon the matters related to that occasion. The tax is imposed upon the "transfer of the net estate." The amount of a federal estate tax is the sum of certain percentages of the value of the net estate. With reference to the actual property owned by decedent at the time of his death and transferred thereby, the amount of tax is greater proportionately where the decedent has in his life time made certain dispositions of his property, or holds at the time of his death certain classes of property. Thus the rate of tax is determined by what the decedent does in his life time.

It is permissible for Congress to determine the rate of tax by reference to property or transactions which could not of themselves be taxed. This is decided in the case of Maxwell v. Bugbee, 230 U. S. 525, and again in Flint v. Stine Tracey Company, 220 U. S. 107. On the other hand, the Supreme Court has held that where the tax itself is imposed with reference to property or transactions over which there is no jurisdiction to tax, it cannot be valid by saying that the tax is merely measured by such property or transaction. (Frick v. Commonwealth of Pennsylvania, 45 Sup. Ct. Rep. 603.) In the instant case there has not been any attempt by Congress to tax either the transfer creating the joint tenancy or a transfer from the decedent to the survivor. Certainly neither the language nor the structure of the act discloses such an attempt, for from both it is perfectly apparent that the "gross estate" is built upon the theory that because the occasion of the tax does not include certain transactions, that is, the mere holding of an estate, the rate of tax should, in the interest of equality, be increased. Assuming that such transactions could not of themselves be taxed, because they are subject only to state regulations, Congress has made them the basis for determining the rate, relying upon the principle enunciated by this court in Maxwell v. Bugbee, *supra.*

(b) *The reason which justifies the inclusion of the estates created after the passage of the act, also justifies the inclusion of estates created prior to the passage of the act.*

The question now being considered is solely one of the reasonableness of classifying joint tenancies with other forms of property for the purpose of measuring the federal estate tax. It must be quite apparent, that, as has been pointed out, the rights of the owners of an estate held in joint tenancy are not fully determined and fixed until the death of one of the tenants. Until that time it is not determined upon whom the survivorship will fall. Neither tenant has the complete and indefeasible and assured right to enjoy the fee. His rights are dependable upon his longevity. His rights cease at death. It is this relationship of death to the consummation or cessation of title that impresses such estates with their quasi-testamentary character and associates them with property, the transfer of which is actually accomplished by death. This relationship is inherent in such estates and in no sense depends upon the time when the estate was created or the taxable occasion, that is, death, occurred. Consequently the classification is none the less reasonable because of the incidental circumstances, that the classification was made after the estate was created. The classification is based not upon the fact that there was a transfer at death, but upon the fact that the decedent's interest terminated at that time.

The time when the estate was created does not change its inherent characteristics or the manifest injustice which would follow a failure to include it in the measure of the tax. *The power of Congress to measure a tax on a present particular occasion by past transactions or circumstances has been upheld as reasonable by the courts.* (Brushaber v. Union Pacific Railroad Co., 240 U. S. 1-20.)

In the case of Schuster & Company v. Williams (283 Fed. 115), it is held that it is lawful to measure an excise tax by the value of the property owned by the taxpayer in the preceding year. In the case of Pennsylvania Company v. Lederer (292 Fed. 629), it was held that the inclusion of property passing under a general power of appointment created prior to the passage of the act was a reasonable method of measuring the federal estate tax and it was likewise held by the District Court of Maryland in the case of Safe Deposit and Trust Company v. Tait (295 Fed. 429), that the inclusion in the gross estate of transfers intended to take effect at or after death was a reasonable method of measuring the tax, although such transfers were made prior to the passage of the act.

Other cases in which the excise tax has been measured by an occurrence which took place prior to the passage of the act are:

Hylton v. United States, 3 Dall. 171;
Flint v. Stone-Tracy Co., 220 U. S. 107;
Carbon Steel Co. v. Lewellyn, 251 U. S. 501;
Hecht v. Malley, 265 U. S. 144;
Shwab v. Richardson, 263 U. S. 88;
Patton v. Brady, 184 U. S. 608;
Railroad Co. v. Collector, 100 U. S. 595;
Stocksdale v. Insurance Co., 20 Wall. 323;
Billings v. United States, 232 U. S. 261.

No conclusion in this case can be based upon the decisions of state courts to the effect that the state cannot constitutionally tax as a transfer at death the passing of the survivorship in a joint estate created prior to the passage of the act. In the first place such cases are decided under constitutional restrictions applicable to states but not to Congress.

For another reason the decisions of the state courts are not authorities in the instant case. This is a case in which any retroactive feature which may be present *relates solely to the measure of the tax.* On the other hand, state taxes are levied upon the *transfer* of the particular property held in joint tenancy. The transfer is not the *measure* of the tax, but it is the *occasion* of the tax. Manifestly constitutional prohibitions against taxing an occasion which has passed are different from those which apply to the taxation of the present occasion, although measured by some past event. In the first case, there is an interference with vested rights. In the second case, the value of the property used as a measure of the tax is not increased or lessened to any extent by being included in the measure. The survivor is not taxed, his interest is not taxed, the transfer to him is not taxed. The tax is solely upon the interest of the decedent which ceased at the time of his death and is payable solely out of the property of the estate.

The command of the statute then is that if two persons shall, after the passage of the act, hold an estate in joint tenancy, and if while this estate is so held, one of the tenants dies, the interest in that property, held by the decedent at his death must be included in the gross estate of the decedent. It is apparent that the estate involved in the instant case being held by the decedent at the time of her death as a joint tenant is exactly within the words and meaning of section 202 (c). Moreover, as has been previously shown, such an estate is exactly within the spirit of the act which purports to include in the measure of the tax all of the decedent's property which she continued to "hold" after the passage of the act and in which her interest ceased by reason of her death.

V.

The Case of Knox v. McElligott Should Be Controlling in the Instant Case.

The case of Knox c. McElligott (258 U. S. 546), is a case involving the taxing of an entire joint tenancy estate. One half the value of this joint estate was included in the return filed by the executor of the estate of the decedent. Subsequently, however, an additional estate tax was assessed by the Commissioner of Internal Revenue on the remaining one half value of the said joint estate. The Supreme Court in the Knox case, *supra,* held it was not proper to tax the entire estate and cited in support thereof Levy v. Wardell, Union Trust Company v. Wardell and Shwab v. Doyle, *supra.* Because of the nature of the estate, the District Court found that the undivided one half interest which had been transferred to the surviving wife prior to the passage of the act was not taxable but held that the decedent's undivided one half interest was taxable. Therefore, it clearly appears that the Supreme Court of the United States in the Knox case has distinctly and clearly manifested its approval in taxing the decedent's interest in a joint tenancy, the decedent's interest being measured by one half the value of the joint estate, which case, it is respectfully submitted, should be and is controlling in the instant case.

Walker v. Grogan (283 Fed. 530), is a case involving the same principle enunciated in the case of Knox v. McElligott and is another case authorizing taxation of the decedent's interest in a joint tenancy.

Conclusion.

In conclusion, the Government's position is briefly summarized as follows:

1. The facts of this case bring it squarely and clearly within the pertinent sections of the statute.

2. The statute, in authorizing the taxation of the value of decedent's interest in the joint estate, is not retroactive. It merely adds to decedent's gross estate the value of her interest in the joint estate at the time of her death and is not a tax on the original transfer of the joint estate as contended by plaintiff.

Therefore, it is respectfully submitted that the tax levied by the commissioner was lawful and correct, and that the judgment appealed from should be reversed.

Respectfully submitted,

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